STATE OF MICHIGAN

COURT OF APPEALS

BELINDA GLOVER and ANGELA L. SPEAKS,

Plaintiffs-Appellants,

v

PONTIAC HOUSING COMMISSION, a public body corporate, and JANICE M. TIPTON,

Defendants-Appellees.

UNPUBLISHED
December 30, 2008

No. 281737
Oakland Circuit Court
LC No. 2005-067387-NZ

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

In this case under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiffs Belinda Glover and Angela Speaks appeal as of right from the trial court's grant of defendant Pontiac Housing Commission's (PHC's) motion for summary disposition under MCR 2.116(C)(10). The trial court also dismissed the WPA claim against individual defendant Tipton. We reverse and remand for proceedings consistent with this opinion.

I. Facts

Individual defendant Janice Tipton is the board president of defendant PHC and served in that position in February 2004 when plaintiffs were hired as Section 8 Administrator and Human Services Administrator. These positions were created in 2003 by PHC's then Executive Director Bernadette Ellsworth and were approved by the PHC board. Plaintiffs and Tipton were friends before plaintiffs were hired and in the summer of 2003 Tipton called and encouraged plaintiffs to apply for the jobs. She assisted them with the interview process by providing them with "job-related documents," arranging their interviews, and sitting on their interview panels. Tipton told others that she was attempting to assemble a "dream team" of employees at PHC who were her friends or relatives and, in fact, several of Tipton's family members and friends were employed at PHC.

At the time plaintiffs' positions were created, PHC was suffering from budget problems, but the director hoped that plaintiffs' jobs would eventually pay for themselves through grants and generation of additional revenue. However, during the first year after their creation, the positions never generated enough income to cover plaintiffs' salaries. Shortly after plaintiffs began their jobs, their relationships with Tipton began to deteriorate. Tipton began to act like

their supervisor, even though in her role as a board member she was directed not to interfere with PHC's day-to-day operations. In August 2004, Tipton became angry with Glover when Glover failed to contact a service provider that Tipton preferred her to use. Tipton barged in to Glover's office, closed the door and pointed her finger in Glover's face while loudly cursing at her. Glover felt threatened and stood up and went in to the hall. As a result of this incident, Glover reported Tipton to the Pontiac police, filed a complaint with the City of Pontiac, and contacted the city's director of human resources. She also reported Tipton to the Detroit United States Department of Housing and Urban Development (HUD) office (which provides funding for PHC).

In October 2004, Speaks reported Tipton to a HUD auditor for what she believed to be improper credit card use, cell phone use and PHC vehicle use. Tipton found out and became angry at Speaks and called her to complain. On October 28, 2008 unsigned, typewritten letters that included highly personal and embarrassing information about both plaintiffs began arriving in the mailboxes of PHC employees, the local school board, and at Pontiac Central High School. Plaintiffs' linguistics expert determined that, in her expert opinion, Tipton wrote these derogatory letters. Speaks reported Tipton to both the Pontiac police and to the city of Pontiac for harassment and intimidation, defamation, and interfering with Speaks' job. In January 2005, Tipton told a friend that she was planning to fire plaintiffs by writing them out of the budget.

In March 2005, PHC's executive director Franklin Hatchett and budget director Steve Hammersly recommended to the board that plaintiffs' positions be eliminated in order to deal with the budget deficit. The entire five-member board, including Tipton, voted to approve the budget and eliminate plaintiffs' jobs. Plaintiffs believe that the budgetary reason for their firings was merely a pretext and that they were fired because they reported Tipton's conduct to authorities. Plaintiffs filed the present suit against defendants alleging a violation of the WPA, violation of the Family Medical Leave Act (FMLA)[1], defamation and invasion of privacy. Defendants filed a motion for summary disposition. The trial court granted defendants' motion stating that plaintiffs failed to establish a causal connection between their discharge and the protected activity. The trial court also dismissed the WPA claim against Tipton individually. Plaintiffs now appeal as of right.

II. Standard of Review

We review de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). In reviewing a motion for summary disposition brought pursuant to subrule (C)(10), the pleadings, affidavits, depositions, admissions, and other admissible evidence must be considered in a light most favorable to the nonmoving party. *Id.* Our review is limited to the evidence that was presented below at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 MichApp 299, 310; 660 NW2d 351 (2003). Summary disposition is properly

[1] This count was later voluntarily dismissed.

granted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Kennedy, supra* at 712.

The determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo. *Phinney v Perlmutter*, 222 Mich App 513, 553, 564 NW2d 532 (1997).

III. Summary Disposition

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition under MCR 2.116(C)(10), where genuine issues of material fact remain. We agree.

The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. MCL 15.362. *Brown v Mayor of Detroit*, 478 Mich 589, 594, 734 NW2d 514, 517 (2007). MCL 15.362 provides that an employer may not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or suspected violation of a federal or state statute or regulation to a public body. The WPA, as a remedial statute, is to be liberally construed to favor the persons the Legislature intended to benefit: those employees engaged in "protected activity" as defined by the act. *Id.*

To establish a prima facie case under the WPA, a plaintiff must show that: 1) he was engaged in protected activity as defined by the act; 2) he was discharged, threatened, or discriminated against; and 3) a causal connection existed between the protected activity and the discharge. *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997). Protected activity consists of: 1) reporting to a public body a violation or a suspected violation of a law, regulation, or rule; 2) being about to report such a violation; or 3) being asked by a public body to participate in an investigation. MCL 15.362

Here, plaintiffs have established that they engaged in a protected activity—reporting Tipton to police, city officials and HUD officials. They have also established that they lost their jobs. The issue to be determined is whether they have presented evidence sufficient to raise a genuine issue of material fact as to the causal connection between the loss of their jobs and their engagement in the protected activity.

In *Trepanier v National Amusements, Inc*, 250 Mich App 578; 649 NW2d 754, 757 (2002) the principal issue was whether the plaintiff was involved in a protected activity that was causally connected with his discharge from his employment. *Id.* at 584. The *Trepanier* Court concluded, "[m]oreover, in this case there is evidence of a causal connection between plaintiff's protected activity and his termination, namely, [the supervisor's] admission that plaintiff was discharged because of circumstances surrounding [the co-worker's] harassment." *Id*. at 587. This case is factually distinguishable from *Trepanier* because the employer in *Trepanier* admitted that the protected activity was a reason for the plaintiff's termination, while here there is no such explicit admission. Nonetheless, if the jury believes plaintiffs' evidence, it could infer a causal connection between plaintiff's reports and plaintiffs' discharge. *Tyrna v Adamo, Inc*, 159 Mich App 592, 601; 407 NW2d 47 (1987).

Here, the trial court erred in concluding that the breakdown in the relationship between Tipton and plaintiffs was not based upon their engagement in protected activity. The evidence

suggests that although plaintiffs and Tipton did have some personal conflicts before plaintiffs engaged in the protected activity, Tipton's ire rose to a new level when she found out that Glover reported her to police and city human resources in August of 2004 and when Speaks reported concerns to the HUD auditor in October 2004. Evidence suggests that Tipton retaliated by sending out defamatory letters. Plaintiffs then engaged in a second round of protected activity in response to these letters and severed any personal relationship with Tipton, after which they lost their jobs.

Plaintiffs' case is similar to that of the plaintiff in *Henry v City of Detroit,* where the plaintiff, a decorated police officer who had never been reprimanded, was forced to retire or take a demotion after giving deposition testimony that had upset the chief of police. *Henry v City of Detroit,* 234 Mich App 405, 594 NW2d 107, 112 (1999). The court there held that, "[w]hether the deposition or plaintiff's job performance was the real reason for defendants' action against plaintiff was a question properly left to the jury." *Id.* at 113. Here, Tipton admitted that plaintiffs' actions upset her. She acknowledged that at one point she sent a letter to Speaks' husband detailing her complaints about how Speaks was doing her job because she was angry about Speaks' accusations. Also, Tipton admitted that in March 2005 she was still angry at Speaks for going to the police. Plaintiffs have introduced expert testimony that suggests that Tipton was angry enough at plaintiffs that she retaliated by writing highly offensive and derogatory letters that she distributed around the community.

Plaintiffs have also introduced evidence that Tipton wielded a great deal of power within PHC. The number of her family members and friends who are employed by PHC evidences this. Furthermore, plaintiffs have introduced evidence that Tipton influenced Hatchett's decision-making, including the fact that Hatchett's father was her attorney, the fact that Hatchett stated that his predecessor would not have been fired if she had just done what Tipton said, and Tipton's admission that Hatchett had never refused to do something she had asked him to. In addition, Tipton stated that the board never really discussed staff cuts because, "that's up to the director." This suggests that once Tipton convinced Hatchett to eliminate plaintiffs, the other board members would not give the matter any further discussion. Therefore, the evidence of Tipton's anger, and of her significant power and influence over Hatchett and within the PHC suggest a causal link between the plaintiffs' engagement in a protected activity and their subsequent discharge and provides the necessary genuine issue of material fact on the issue of causation.

Defendants argue that, even if there is a link between plaintiffs' whistleblowing and their discharge, it is insignificant in light of the articulated reasons for plaintiffs' firing. The trial court did not reach this issue. However because it is potentially dispositive, we will address it.

This Court has found that the WPA bears substantial similarities to Michigan civil rights statutes and that actions under the WPA are analyzed using the "shifting burdens" framework utilized in retaliatory discharge actions under the Elliott-Larsen Civil Rights Act (ELCRA), MCL § 37.2101 *et seq. Anzaldua v Band,* 216 Mich App 561, 580, 550 NW2d 544 (1996). Thus, the plaintiff bears the initial burden of establishing a prima facie case. *Hopkins v Midland,* 158 Mich App 361, 378, 404 NW2d 744 (1987). If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the discharge. *Id.* If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff

must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. *Id.*

Here, defendant offered ample evidence that plaintiffs were discharged for reasons related to the budget. However, plaintiffs argue that this was merely a pretext because they were the only employees who lost their jobs in March 2005 and there were a variety of other ways that defendants could have balanced their budget. Also, shortly after plaintiffs were discharged, other employees received discretionary raises. Furthermore, many of the employees who were retained had less seniority and were personally connected through family or friendship to Tipton.

Once the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered. In *Hopkins, supra* at 380, the Court adopted the test used in Civil Rights Act situations. *Id.* Under this test, "an employee may meet the burden of showing pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ' *Id.* This Court reaffirmed that this is the applicable test for proving pretext under the WPA in *Roulston v Tendercare, Inc,* 239 Mich App 270, 281; 608 NW2d 525 (2000). Hence, plaintiffs can prove defendants' proffered legitimate business reason for discharging them was a pretext by offering evidence that defendants were more likely motivated by a retaliatory reason or by showing that the proffered reason is not worthy of credence. Consequently, if plaintiffs can present evidence sufficient for a jury to conclude that the proffered reason was a pretext under either method, then a trial court's grant of summary disposition in favor of defendants is inappropriate.

We conclude that summary disposition would not have been appropriate because factual issues remain regarding whether defendants' budgetary reasons were merely a pretext for plaintiffs' firings. As previously noted, plaintiffs have offered evidence that could potentially satisfy either method of proving pretext. First, that the budgetary decisions were not credible in context of the other employees who were given raises, the other employees who were not discharged and other budget cuts that were not made, but could have been. Second, plaintiffs have offered evidence that Tipton's anger at their engagement in protected activity and of the levels to which she was willing to take her vindictiveness suggest that they were fired for retaliatory reasons.

In conclusion, the evidence establishes that genuine issues of material fact remain as to whether plaintiffs have established their prima facie case under the WPA. Further, the question of whether defendants acted on the basis of a legitimate, non-retaliatory reason in discharging plaintiffs is a disputed question of fact that would also preclude summary judgment.

IV. Tipton's Individual Liability Under WPA

Next, plaintiffs argue that the trial court erred in finding that Tipton was not plaintiff's employer and in concluding that she could not be liable. We agree.

The WPA contains its own definitions of "employer" and "employee." "Employer" is defined as "a person who has 1 or more employees. Employer includes an agent of an employer...." MCL 15.361(b). "Employee" is defined as "a person who performs a service for wages or other remuneration under a contract for hire, written or oral, express or implied."

In *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005), our Supreme Court interpreted the definition of "employer" and also examined individual liability under ELCRA. This interpretation and analysis can be applied to the present case because this Court has previously determined that whistleblower statutes are analogous to antiretaliation provisions of other employment discrimination statutes and the policies underlying these similar statutes warrant parallel treatment. *Roulston, supra* at 280 (the WPA bears substantial similarities to Michigan's civil rights statutes). *Heckmann v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005) overruled in part on other grounds in *Brown, supra*.

Our Supreme Court held in *Elezovic*, that "because employers can be held liable under the [ELCRA], and because agents are considered employers, agents can be held liable, as individuals, under the [ELCRA]." After remand, in *Elezovic v Bennett*, 274 Mich App 1, 10, 731 NW2d 452 (2007) this Court held that one becomes an "agent" for purposes of the ELCRA, through "delegation of general supervisory power and authority." "Specifically, persons to whom an employing entity delegates supervisory power and authority to act on its behalf are agents, as distinguished from coemployees, subordinates, or coworkers who do not have supervisory powers or authority, for purposes of the [ELCRA]." *Id*.

Here plaintiffs have provided evidence from which a factfinder could conclude that Tipton, in her role as PHC board president, was acting as an agent of PHC. A review of the number of staff members who are Tipton's friends or family members indicates that she has a great deal of influence over the hiring process both within PHC and over contracts with outside entities that perform work for PHC. Furthermore, she was personally present at the interviews of both plaintiffs. In addition, plaintiffs provided several examples of occasions where Tipton engaged in behavior of a supervisory nature. This behavior included: Tipton's attempt to ban plaintiffs from attending PHC board meetings; Tipton's removal of Speaks from a business meeting and requirement that she immediately assist a program participant; Tipton's telephone call to Speaks and warning not to give direction to employees outside her division; and repeated phone calls to Glover to inquire about one of Glover's subordinates of whom Tipton did not approve .

Although defendants argue that Tipton and plaintiffs are coemployees and that Tipton had no control over day-to-day operations at PHC, we find that while this may be how the PHC is supposed to operate, evidence sufficient to survive a motion for summary disposition indicates that, in reality, Tipton had wide-ranging authority over day-to-day operations including hiring, general supervision and possibly firing of employees. Tipton may have been specifically directed not to engage in such activities by HUD, yet plaintiffs presented evidence that she did play the role of supervisor at PHC without repercussion.

In addition, even if Tipton were engaging in behavior that was technically outside the scope of her job as PHC board president, we find that plaintiffs have also presented sufficient evidence to establish a question of fact as to whether Tipton was acting with apparent authority. Apparent authority is "[a]uthority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even though the principal did not confer or intend to confer the authority. Apparent authority arises "when acts and appearances lead a third person reasonably to believe than an agency relationship exists." *Meretta v Peach,* 195 Mich App 695, 698-699; 491 NW2d 278 (1992). "Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent." *Id.* at 699. A court must examine the

surrounding facts and circumstances to determine if an agent possesses apparent authority to perform a particular act. *Id.* Defendants argue that any apparent authority in this case cannot be traced back to the board. However, if one examines the evidence of nepotism at PHC and of Tipton's day-to-day role, there is a question of fact as to whether the board gave tacit approval of Tipton's authority.

In short, the trial court erred in finding that Tipton was not personally liable under the WPA where issues remain for the factfinder about her role as an agent or apparent agent of PHC.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly